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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-105

DHX, INC.
v.
MATSON NAVIGATION COMPANY AND SEA-LAND SERVICE, INC.

Decided: December 19, 2001

DHX, Inc. (DHX), a freight forwarder,[1] has filed a complaint challenging the reasonableness of certain rates and practices of two water carriers in the noncontiguous domestic trade, Matson Navigation Company (Matson) and Sea-Land Service, Inc., now SL Service, Inc. (SL). Defendants Matson and SL have answered the complaint and filed motions to dismiss. DHX replied.

The motions to dismiss identify substantial shortcomings in DHX's complaint. Indeed, it appears that DHX's preferred approach to prosecuting its case, if pursued to its logical conclusion, would not succeed. To prevail, DHX will have to flesh out the specific rates for specific shipments that it asserts are unreasonable, and it will have to support with particularity its general claim that the carriers' practices are unlawful. But we cannot conclude at this point that DHX has not raised any claims that, if proven, could demonstrate a violation of the law. Therefore, we will deny the motions to dismiss.

BACKGROUND

In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress centralized in the Board the formerly bifurcated jurisdiction over rates in the noncontiguous domestic trade[2] that existed between our predecessor, the Interstate Commerce

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[1] See 49 U.S.C. 13102(8).

[2] The noncontiguous domestic trade involves domestic water transportation (that is, transportation between states, United States territories, or U.S. possessions) that originates or terminates in Alaska, Hawaii, or a U.S. territory or possession. See 49 U.S.C. 13102(15). In various pre-ICCTA agency and court decisions, it was often referred to as the "domestic offshore" trade.

Commission (ICC), and the Federal Maritime Commission (FMC).[3] One post-ICCTA water carrier case filed at the Board, Government of the Territory of Guam v. Sea-Land Service, Inc., American President Lines, Ltd., and Matson Navigation Company, Inc., STB Docket No. WCC-101 (STB served Nov. 15, 2001) (GovGuam), involves a challenge to the overall rate structures of Matson and SL in connection with their water rates to or from Guam. Here, DHX seeks to challenge particular rates or practices of these carriers in the U.S./Hawaii trade.

The Tariffs at Issue. Defendants maintain certain tariffs[4] for the ocean transportation of weight-rated, dry commodities shipped in containers. When a single ("stand-alone") container is shipped under these tariffs, charges are assessed on the basis of the per-100-pound rate for the commodity, subject to a minimum weight requirement that varies depending on the size of the container. The effect of the minimum weight provision, standing alone, is that shippers whose freight does not meet the minimum weight specified in the tariff would, in effect, pay a rate that is higher than the per-100-pound rate established in the tariff for their commodity.

These tariffs, however, also contain special rules for so-called "overflow" containers.[5] A partially filled container is deemed an overflow container if it is shipped by the same shipper, on the same vessel/voyage, as a full container (now called a "lead" container).[6] The charge for the overflow container is likewise determined by applying the per-100-pound rate listed in the tariff to the actual weight of the commodity, but the overflow container is subject to a flat (not weight-related) minimum charge that varies depending on the size of the container. Thus, shippers who tender a volume of freight in excess of the capacity of the lead container would pay the per-100-pound rate for the lead container and could still end up paying a higher rate per-100-pounds for the overflow container. However, because the flat minimum charge for the overflow container is generally less than the weight-based minimum charge for a stand-alone container, shippers can pay a lesser charge than would be applicable if there were no overflow provision.

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[3] The FMC had jurisdiction over complaints challenging the reasonableness of "port-to-port" rates (rates that do not involve the services of an inland U.S. railroad or motor carrier). The ICC had jurisdiction over complaints challenging the reasonableness of joint rates in the domestic offshore trade (rates held out jointly by water carriers and inland rail or motor carriers). See Joint ICC/FMC Policy Statement, 8 I.C.C.2d 243 (1991).

[4] Matson's Tariff No. 14-F; SL's Tariff No. 468.

[5] See Matson's Tariff No. 14-F, Rule 31. Although no copy was provided, it appears that SL's Tariff No. 468, including its overflow provision, is substantially similar to Matson's tariff.

[6] For convenience, we simplify our discussion here to focus on the basic scenario of one lead container and one overflow container. We note, however, that the overflow provisions actually apply to the last, partially filled container in a group of any number of containers.

DHX's Freight Forwarder Status. As a freight forwarder, DHX maintains the dual status of carrier (vis-a-vis its shippers) and shipper (vis-a-vis the underlying carrier it uses).[7] Thus, with respect to the tariffs at issue here, DHX is a shipper entitled to take advantage of the overflow provisions and to challenge the carriers' rates as unreasonably high. DHX has established a business niche by helping its customers (which are shippers vis-a-vis DHX) take advantage of the most favorable rate by assembling and consolidating, for a charge, the traffic of several shippers into mixed containers.[8] In its capacity as a carrier, DHX competes with the defendants for traffic that defendants could themselves solicit.

The Complaint. Under 49 U.S.C. 13701(a), a rate, classification, rule, or practice relating to transportation by or with a water carrier in noncontiguous domestic trade must be reasonable. A complaint alleging a violation of that requirement may be filed with the Board under 49 U.S.C. 13701(c), and, if we find a violation, we may prescribe an appropriate rate, classification, rule, or practice pursuant to 49 U.S.C. 13701(b). However, a rate increase may be shielded from challenge by the statutory zone of reasonableness (ZOR) for post-ICCTA movements. Specifically, 49 U.S.C. 13701(d)(1) provides that "a rate or division of a . . . water carrier for port-to-port service in [noncontiguous domestic] trade is reasonable if the aggregate of increases . . . in any such rate or division is not more than 7.5[%] above . . . the rate or division in effect 1 year before the effective date of the proposed rate or division."

In its complaint, DHX contends that defendants have: (1) implemented rate increases that violate the rate reasonableness provisions of 49 U.S.C. 13701 and that "constitute unreasonable business practices;" and (2) engaged in "a variety of [other] unreasonable, unfair, and destructive practices" that DHX claims are inconsistent with various provisions of the national transportation policy (NTP) set forth at 49 U.S.C. 13101.

The main focus of the complaint is that Matson and SL increased the minimum charge for an overflow container by 10% on September 6, 1998, and 7.5% on October 17, 1999. DHX argues that these increases exceeded the annual limits in the ZOR.[9] DHX asks that we: (1) find that the increases in overflow rates are unreasonable; (2) prescribe a reasonable rate for the period since September 6, 1998; and (3) award reparations for all amounts charged by defendants in excess of the reasonable rate.

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[7] See Exem. of Freight Forwarders From Tariff Filing Requir., 2 S.T.B. 48, 50 (1997).

[8] Some of the savings that DHX can procure for its shippers by aggregating and consolidating their shipments are passed through to DHX.

[9] Because its rate complaint challenges only the increases in the minimum rates for overflow containers, DHX evidently concedes the reasonableness of the rate level on and before September 6, 1998.

DHX also complains that the defendants have, since September 1998, implemented numerous other changes that affect overflow rates,[10] including: (1) redefining the word "shipment" in the tariffs to reduce the number of containers that would qualify for overflow rate status; (2) eliminating, through footnote changes, the number of containers that could qualify as lead containers; (3) eliminating the possibility that machinery could be shipped at lower commodity rates, resulting in a 61% increase in machinery rates; (4) making other changes that greatly increased the rates of commodities mixed in with foodstuffs; and (5) imposing increases to all weight-rated commodity rates.

Finally, DHX argues that the defendants have engaged in a variety of unreasonable, unfair, and destructive practices to reduce or eliminate the effectiveness of the competitive tools that freight forwarders have developed in order to compete with steamship lines in the solicitation of full-container business.

Motions to Dismiss. Matson and SL assert that the complaint fails to state a valid basis for finding their actions to be unlawful under ICCTA and that it should therefore be dismissed. Specifically, they argue that: (1) the minimum charges for overflow containers are components of multi-container shipment rates, not separate "rates;" (2) there have been no increases in multi-container rates that exceed the ZOR; (3) a rate increase that exceeds the ZOR is not per se unreasonable; (4) rates that are discounted from full-container rates that are unchallenged and would otherwise apply cannot be unreasonably high no matter what the level of the discount; and (5) DHX has not stated any other basis for finding any rates, rules, or practices unlawful.

Alternatively, the carriers submit that, even if DHX has stated a cognizable claim, a full-scale investigation and complaint proceeding would not be warranted because the undisputed facts establish that the actions complained of are not unreasonable as a matter of law. Accordingly, they seek summary judgment.

DISCUSSION AND CONCLUSIONS

We may dismiss a complaint that "does not state reasonable grounds for investigation and action." 49 U.S.C. 14701(b). See Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104 (STB served Dec. 10, 1999). As Matson and SL demonstrate, DHX appears to misconstrue the law in various respects. Nevertheless, we cannot say that the concerns that DHX has raised, if properly pled, could not under any circumstances provide a basis for investigation and action. Therefore, we will not grant dismissal or summary judgment.

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[10] In its complaint, DHX portrays these tariff changes as "more subtle increases in . . . rates aimed at DHX."

The carriers argue that the complaint is fundamentally flawed in its attempt to focus on the rates for overflow containers separate from the rates for the lead containers on which they are dependent. We agree. It is true that, according to Rule 31 of Matson's Tariff, each container must be rated as if it were a separate shipment. The overflow rates, however, can apply to partially filled containers only if a "single shipment" exceeds the capacity of one container and all containers in the shipment are tendered to and loaded on the same vessel/voyage. Thus, we agree with the carriers that, for purposes of a rate reasonableness assessment, overflow rates are not separate rates, but are components of the rates applicable to multi-container shipments. To the extent that DHX seeks to challenge overflow rates as if they are separate rates, its complaint cannot succeed.

The carriers also challenge DHX's assumption that rate increases in excess of the ZOR are per se unreasonable; in this regard, they assert that none of the increases in their multi-container rates in fact exceed the ZOR. As we explained in some detail in GovGuam, while the ZOR is a safe harbor provision that protects rate changes from challenge, there is nothing in the statute to suggest that a rate is unlawful simply because increases may have exceeded the ZOR. DHX may pursue its argument (Complaint, paragraph 11) that the carriers' rate increases are unlawful even without reference to the ZOR. But if DHX seeks to rely solely on the fact that a rate increase exceeds the ZOR, its complaint will not succeed. DHX must, to support a rate reasonableness complaint, indicate which particular multi-container rates it is challenging and why those rates, if outside of the ZOR,[11] are unreasonable.[12]

[11] Under 49 U.S.C. 13701(d)(2), the percentage specified in the statute must be increased or decreased by the percentage change in the Producers Price Index (PPI) that occurred during the 1-year period before the rate increase took effect. Although both sides acknowledge that the percentage must be adjusted, neither has done so in its presentation. Consequently, we have calculated the required adjustments to the ZOR as follows:

(1) For 1998, the ZOR, when adjusted for the decrease in the PPI, is 6.5%;
(Base x ZOR x (Sept. 1998 PPI / Sept. 1997 PPI))/ Base = Adjusted ZOR
(100 x 1.075 x (130.6 / 131.8)) / 100 = 1.065

(2) For 1999, the ZOR, when adjusted for the increase in the PPI, is 10.3%.
(Base x ZOR x (Oct. 1999 PPI / Oct. 1998 PPI))/Base = Adjusted ZOR
(100 x 1.075 x (135.1 / 131.4)) / 100 = 1.103

[12] We do not at this point accept Matson's suggestion that the level of its discounted rates could never be found to be unreasonable or that they could never be an element of an unreasonable practice case; we will instead reserve our judgment as to the reasonableness of specific rates or practices until specific evidence and arguments are brought before us.

Finally, although DHX has framed its case as principally a rate case, it appears to us that the gravamen of its complaint is that Matson and SL have engaged in unreasonable practices in an effort to put consolidators such as DHX out of business. Although parties may not use the unreasonable practice provisions of the statute to bolster a weak rate case, cf. Union Pacific R.R. v. ICC, 867 F.2d 646, 649 (D.C. Cir. 1989), we cannot at this point say that DHX could not possibly prevail in an unreasonable practice complaint.

Thus, we will not dismiss the complaint or grant summary judgment.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion for summary judgment is denied.

2. The parties shall consult with each other and jointly recommend a procedural schedule by January 30, 2002.

3. This decision is effective on the date served.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary